DAVID A. ROSENFELD, Bar No. 058163
CAROLINE N. COHEN, Bar No. 278154
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net
ccohen@unioncounsel.net

Attorneys for Charging Party INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 16

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 20

DELTA SANDBLASTING COMPANY, INC., Respondent, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 16, Charging Party.	Case No. 20-CA-176434 32-CA-180490 **BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. CROSS-EXCEPTIONS AS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT NO AGREEMENT WAS REACHED

The Administrative Law Judge ("ALJ") properly found that the parties historically had an "extremely informal" negotiation style "consisting of a series of phone calls and a few in-person discussions" between Jose Santana ("Santana"), the business representative responsible for dealing with Delta Sandblasting Company, Inc. ("Delta" or "Respondent"), and the late Robert "Bobby" Sanders ("Sanders"), the owner of Delta until his death. The ALJ recognized that the parties' agreements historically had mirrored the agreement with the general contractor BAE, with the addition of a "Supplemental Agreement," which included certain carve-outs to suit the

small business operations of Delta. The ALJ also properly concluded that Santana directed an administrative assistant to prepare a 2015-2018 collective bargaining agreement for Delta in late March 2016.

However, inconsistent with such findings, the ALJ erroneously concluded that Respondent and the Charging Party did not have a meeting of the minds despite Santana's testimony that Sanders verbally assented to the collective bargaining agreement's terms, in line with the parties' historically highly informal negotiations. The Charging Party takes exceptions to the ALJ's finding that there was no meeting of the minds and thus, no violation of the Act because such finding is both contrary to the parties' historically informal negotiations and, in part, reliant on the hearsay testimony of Sanders' friends Floyd Farley ("Farley") and John Capovilla ("Capovilla").

Despite making a finding that Respondent had not rebutted Santana's testimony that he dropped by Sanders' office to confirm his agreement with the contract in April 2016, the ALJ improperly credited the general testimony of Sanders' friends Farley and Capovilla as to Sanders' comments allegedly made about or to the Union. The ALJ's finding on this point is colored by the conclusion that Farley's and Capovilla's testimony "present[ed] a less sunny picture" of the relationship between Sanders and the Union. In addition to disregarding the absence of direct rebuttal evidence, such a conclusion is met with little to no analysis as to the mistaken conclusion that the hearsay exception in Fed. R. Evid. 803(3) applied. Fed. R. Evid. 803(3) provides the following exception to the hearsay rule:

> A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Farley's and Capovilla's testimony as to statements allegedly overheard and made by Sanders during the course of the May 3, 2016 phone call, and generally about his sentiments toward the Union, all included statements of memories to prove a fact remembered. Putting aside the potential bias of their testimony as friends of the late Sanders, their ability to accurately recall

particular statements allegedly made by Sanders is questionable given they were not participants in the collective bargaining process, nor were they familiar with the full course of negotiations nor the informal bargaining history between the parties.[1] It is only after-the-fact, when called as witnesses at a Board hearing to help defend their friend's family in a unfair labor practice charge, that Farley and Capovilla are asked to recall an alleged conversation between Sanders and Santana and comments by Sanders allegedly made about the Union. Thus, rather than being statements of Sanders' then-existing state of mind or emotional condition, their statements are those of memories to prove Respondent's claimed fact: that there was no meeting of the minds on the contract. Farley's and Capovilla's testimony thus does not qualify for the hearsay exception under Fed.R.Evid. 803(3) and should be disregarded for that reason.

Just as the ALJ found that Sanders' concern with rising labor costs was not determinative as to whether a meeting of the minds occurred, the hearsay testimony of Farley and Capovilla should not be credited for a conclusion that no agreement was reached. Farley's and Capovilla's testimony is not only unreliable testimony for the reasons noted above, but it is not conclusive on the issue of whether the parties verbally reached an agreement given Santana's testimony that otherwise largely was not directly rebutted.

II. REMEDIES AGAINST DELTA

In addition to the order to pay delinquent pension funds owed and to continue to make timely contribution payments until Respondent bargains in good faith to a contrary agreement or a bona fide impasse, the remedy in this case is primarily notice posting and electronic notices posted via the intranet or email to the employees. It will be necessary to mail the notice to the employees to ensure their receipt of the notices, particularly those who are no longer working for Delta at the time of the 60-day notice posting ordered.

[1] At the hearing, each witness also admitted that they could not hear the voice on the other end of the phone line on May 3, 2016, and that they had been drinking alcohol at the time they allegedly overheard the telephone conversation between Sanders and Santana during their fishing trip in Mexico. Thus, their ability to accurately recall and testify as to the conversation and the emotional state of Sanders is further called into question.

The physical and electronic postings and the mailing, however, should not be limited to a simple notice. The mailing should include a copy of the Board's Decision. Only with a mailing of the Notice and the full Decision can the employees understand what the notice is about and the background. The mailing of only the notice will be largely meaningless to those employees who receive the notice because they won't have the background or explanation.

The Notice in this case should not be merely a "We Will Not" notice. The notice should require an admission by Delta that the Act has been violated. The notice, for example, should state:

> We have failed to execute and comply with an agreed-upon successor collective bargaining agreement for 2015-2018. We have failed to pay all pension compensation owed to the employees. As a result of this failure, we must pay all delinquent pension contributions owed. We must timely make contributions owed in the future to be compliant with the National Labor Relations Act.

This language or similar language should be included in the notice. Only through an affirmative recognition that misconduct has occurred will there be effective notice to the employees and appropriate recognition by the employer that the Act has been violated. A longer notice posting period and readings should be required for this same aim.

An affirmative order to execute and comply with the 2015-2018 collective bargaining agreement is necessary in light of the above-noted cross-exceptions.

III. CONCLUSION

We seek traditional remedies against Delta Sandblasting with the cross-exceptions noted above. Namely, the Charging Party seeks an Order requiring Respondent to execute and comply with the 2015-2018 Collective Bargaining Agreement verbally agreed upon by the parties. The remedy we seek against the Respondent is appropriate given the evidence presented at hearing and given the significant interest in effectuating the contract so that members have stability and

harmonious labor relations. For these reasons, the Board should modify the ALJ's Decision accordingly.

Dated: November 21, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ Caroline N. Cohen

By: DAVID A. ROSENFELD
CAROLINE N. COHEN

Attorneys for Charging Party INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 16

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On November 21, 2017, I served the following documents in the manner described below:

BRIEF IN SUPPORT OF CROSS- EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Gary Shinners
National Labor Relations Board
Executive Secretary
1015 Half Street SE
Washington, D.C. 20570-0001
(202) 273-3737 General
(202) 273-0086 Fax

Via Electronic Filing

Ms. Cecily Vix
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738
(415) 356-5156 (fax)
Cecily.Vix@nlrb.gov

Attorney for the National Labor Relations Board

Alan S. Levins, Esq.
Paul Goatley, Esq.
Littler Mendelson, P. C.
333 Bush Street, 34th Floor
San Francisco, CA 94104-2842
alevins@littler.com
pgoatley@littler.com

Attorneys for Employer, Delta Sandblasting Company, Inc.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 21, 2017, at Alameda, California.

/s/ Karen Kempler
Karen Kempler